91-1163 (1)

Supreme Court, U.S.
FILED
DEC 5 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term, 1991

BRUNO MANNELLO,

Petitioner

-against-

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE THIRD CIRCUIT

Cheryl J. Sturm
853 Penns Way
West Chester, PA 19382-8153
(215) 793-1845

Counsel of Record and
Attorney for Petitioner
Bruno Mannello

24 pp

QUESTIONS PRESENTED

1. Whether a District Court's imposing restitution without complying with the statutory scheme as set forth in 18 U.S.C. §3579 and 18 U.S.C. §3580 constitutes an unauthorized sentence which may be corrected in a motion brought pursuant to 28 U.S.C. §2255?

PARTIES

The names of all parties to the proceeding in the court whose judgment is sought to be reviewed here appear in the caption of the case.

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STATEMENT OF JURISDICTION

This is a Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit at Docket Number 91-1304.

Bruno Mannello ["Mannello"] appealed the March 27, 1991 order of the United States District Court for the Eastern District of Pennsylvania which had jurisdiction pursuant to 28 U.S.C. §2255.

On September 6, 1991, the United States Court of Appeals for the Third Circuit, which had jurisdiction pursuant to 28 U.S.C. §1291, affirmed the order of the lower court.

On October 7, 1991, the United States Court of Appeals for the Third Circuit denied Mannello's Petition for Rehearing.

This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. §2255 is reprinted, in pertinent part, below, as follows:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of. . .laws of the United States. . .or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside, or correct the sentence. . .

Unless the motion, and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served on the United States Attorney, grant a prompt hearing thereon, and determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the sentence was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

***

18 U.S.C. §3579 is reprinted, in pertinent part, below, as follows:

(a) (1) The court, when sentencing a defendant convicted of an offense under this title...may order...that the defendant make restitution to any victim of such offense...

(b) The order may require that such defendant---

(1) in the case of an offense resulting in...loss or destruction of property of a victim of the offense--

(A) return the property to the owner...or

(B) pay an amount equal to the greater of--

(i) the value of the property on the date of the...loss...or

(ii) the value of the property on the date of sentencing, less the value...of any part of the property that is returned...

(c) To the extent that the court determines that the complication and prolongation of the sentencing process resulting from the fashioning of an order of restitution under this section outweighs the need to provide restitution to any victims, the court may decline to make such an order...

***

18 U.S.C. §3580 is reprinted, in pertinent part, below as follows:

(a) The court, in determining whether to order restitution under section 3579 of this title and the amount of such restitution, shall consider the amount of the loss sustained by any victim as a result of the offense, the financial resources of the defendant, the financial needs and earning ability of the defendant and the defendant's dependents and such other factors as the court deems appropriate...

(b) The court may order the probation service of the court to obtain information pertaining to the factors set forth in subsection (a) of this section. The probation service of the court shall include the information collected in the report of presentence investigation...

(d) Any dispute as to the proper amount...of restitution shall be resolved by the court by a preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the attorney for the Government. The burden of demonstrating the financial resources of the defendant and the financial needs of the defendant and such defendant's dependents shall be on the defendant...

STATEMENT OF THE FACTS

Indictment Number 84-176-01 charged Bruno Mannello, Frank Hutchinson, Carl Grecco, Stephen Jones, and Michael Kakas with various crimes stemming from the theft of food stamps from the U.S. Bank Note Company.

On July 9, 1984, Mannello, who was tried alone, was convicted by a jury of counts 1-5 and 8-9. On February 21, 1986, Mannello was sentenced to ten years' imprisonment, followed by five years' probation, plus restitution in the amount of $4.8 million less any amount the Government has recovered. [AA-7].

On January 9, 1990, Mannello filed a §2255 Motion to Vacate, Set Aside, or Correct Sentence. On February 2, 1990, the Government answered. On February 8, 1990 Mannello traversed the answer.

On July 16, 1990, Magistrate Naythons filed a Report and Recommendation recommending, inter alia, that the sentence be set aside because the district court failed to "make the required findings of fact as to restitution." [AA-8].

On March 27, 1991, the district court rejected the Magistrate's Recommendation because, "To hold a hearing, make findings, and resentence

Mannello at this juncture would be a complete waste of time." [AA-10]. On March 27, 1991, the district court issued an order denying Mannello's §2255 Motion. [AA-11]. The order was not docketed until April 17, 1991. [AA-6].

THE KEY FACTS

The district court's memorandum and order makes it plain that he considers compliance with the Victim and Witness Protection Act a "waste of time." [AA-10].

The district court concedes "...the magistrate judge is correct that there were no explicit findings of fact concerning restitution..." [AA-8].

The district court concedes he did not require the attorney for the Government to establish what amount it lost through the redemption of the stolen food stamps because the task would be "monumental." [AA-9-10].

The district court concedes he did not consider any of the factors spelled out in 18 U.S.C. §3580 including the amount of loss suffered by the victim, the financial resources of the defendant, the financial needs of his dependents, despite the fact that the information necessary to make such findings was collected and included in Mannello's Presentence Investigation Report. [AA-8-10].

PRIOR PROCEEDINGS

The United States District Court for the Eastern District of Pennsylvania, which had jurisdiction pursuant to 28 U.S.C. §2255, denied Mannello's §2255 Motion on March 27, 1991. The order was docketed April 17, 1991. [AA-6, 11].

The United States Court of Appeals for the Third Circuit, which had jurisdiction pursuant to 28 U.S.C. §1291, affirmed the lower court's decision. [AA-2].

On October 7, 1991, the United States Court of Appeals for the Third Circuit denied rehearing. [AA-1].

REASONS FOR GRANTING THE WRIT

I. THIS CASE CONFLICTS WITH HUGHEY VS. UNITED STATES, 110 S.Ct. 1979, 109 L.Ed.2d. 408 (1990) WHICH STATES THAT A VICTIM AND WITNESS PROTECTION ACT ["VWPA"] RESTITUTION ORDER IS UNAUTHORIZED UNLESS IT COMPLIES WITH THE VWPA'S STATUTORY SCHEME.

II. THIS CASE CONFLICTS WITH HILL VS. UNITED STATES, 368 U.S. 424, 82 S.Ct. 468, 7 L.Ed.2d. 417 (1962) WHICH STATES THAT §2255 IS AN APPROPRIATE MECHANISM FOR ATTACKING A SENTENCE THAT IS UNAUTHORIZED.

I. THE HUGHEY CONFLICT

The Third Circuit's opinion cannot be squared with Hughey vs. United States, 110 S.Ct. 1979, 109 L. Ed. 2d. 408 (1990).

In Hughey, supra, this Court acknowledged a district court has no inherent authority to impose restitution; rather, such authority is bestowed on the district court by a statute.

In this case, the authority is the Victim and Witness Protection Act ["VWPA"], 18 U.S.C. §3579 and 18 U.S.C. §3580.

The VWPA, which establishes criteria for exercising the authority to impose restitution, "implicitly requires the district judge to balance the victim's interest in compensation against the financial resources of the defendant--all while remaining faithful to the rehabilitative, deterrent, retributive, and restrictive goals of criminal sentencing." United States vs. Bruchey, 810 F2d. 456, 458 (4th Cir. 1987).

Under the VWPA, the district judge is not a loose cannon; rather, the district judge has no authority to impose restitution unless he exercises the authority in conformity with the criteria set forth in the VWPA.

In Hughey, this Court wrote:

> The plain language of VWPA makes clear that the District Court's restitution order in this case was **unauthorized**.
> [Emphasis Supplied]

A sentence which is "unauthorized" is no different from a sentence imposed without jurisdiction, a sentence imposed in excess of the statutory maximum, or other species of illegal sentence.

Customarily, all species of illegal sentence are subject to collateral attack. Hill vs. United States, 368 U.S. 424, 427, 7 L.Ed.2d. 417, 420, 82 S.Ct. 640 (1963).

II. THE HILL CONFLICT

It is well-established a restitution order may not exceed the actual losses incurred by the victim flowing from the offense for which the defendant has been convicted. Hughey, supra, United States vs. Boswell, 565 F2d. 1338 (5th Cir.), cert. den. 439 U.S. 819, 99 S.Ct. 81, 58 L.Ed. 2d. 110 (1979), United States vs. Gering, 716 F2d. 615, 625 (9th Cir. 1983).

But this axiom is easier said than applied. For example, when the victim frustrates the statutory scheme by refusing to establish actual loss, is the victim entitled to restitution based upon a vague approximation of loss, or does the victim forfeit the right to restitution?

Here Mannello stole food coupons, which are more like scraps of paper with pictures on them than currency or negotiable instruments. Because these scraps of paper have no value unless and until they are redeemed, it is senseless to calculate the Government's losses based on the missing scraps of paper rather than the amount of coupons redeemed.

Although this curious methodology is expedient in that it spares the Government the statutory obligation of proving losses, it leads to calculations

that are so imprecise, so exaggerated that they have no place in a court of law.

The methodology might be understandable were there no other way, but that's not so in this case because the district court concedes the victim can determine exactly which coupons were redeemed and which coupons were not redeemed though the task would be "monumental." [AA-10].

Where, as here, the trial judge imposes restitution without proof of actual damages, the sentence is as illegal and void as a fifty year sentence for a crime carrying a five year maximum.

Ironically, the Court of Appeals opinion here clashes with United States vs. Resnick, 438 F2d. 354, 358-359 (5th Cir.), cert. den. 414 U.S. 1008, 94 S.Ct. 370, 38 L.Ed.2d. 246 (1973), and United States vs. Rosenbarger, 536 F2d. 715, 722 (6th Cir. 1976) which implies collateral attack might be the better way to attack a non-conforming restitution order than direct appeal because of the district court's unique capability of enhancing the record.

The Court of Appeals opinion to the effect that non-compliance with the criteria set forth in the VWPA does not constitute grounds for a §2255 Motion is such a departure from established precedent that neither the Magistrate, nor the District Court thought to discuss it in their respective opinions.

CONCLUSIONS

Based on the foregoing, the Writ of Certiorari should issue.

Respectfully Submitted,

Cheryl J. Sturm
Attorney-At-Law

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 91-1304

UNITED STATES OF AMERICA,

Appellee,

vs.

BRUNO MANNELLO,

Appellant.

SUR PETITION FOR REHEARING

Present: Stapleton, Greenberg and Aldisert, Circuit Judges.

This petition for panel rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this court, and no judge who concurred in the decision having asked for rehearing, the petition for panel rehearing is denied.

BY THE COURT

/signature/
Circuit Judge

Oct 7-1991/stamp/

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO.91-1304

UNITED STATES OF AMERICA

vs.

BRUNO MANNELLO,

Appellant

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Criminal No. 84-00176-01)
District Judge: The Honorable J. William Ditter, Jr.

Submitted under Third Circuit Rule 12(6)
Thursday, September 5, 1991

Before: STAPLETON, GREENBERG and ALDISERT,
Circuit Judges.
(Filed SEP 6-1991/stamp/)

MEMORANDUM OPINION OF THE COURT

ALDISERT, Circuit Judge.

This appeal by Bruno Mannello from a refusal of the court to vacate, set aside or correct his sentence under 28 U.S.C. § 2255 requires us to decide whether his sentence was improperly enhanced and whether the court had ample basis for ordering Mannello to make restitution.

Jurisdiction was proper in the district court based on 28 U.S.C. § 2255. This being an appeal from a final order, we have jurisdiction under 28 U.S.C. § 1291. The appeal was timely filed. Because the questions presented involve interpretation of law, th appropriate standard of review is plenary. Carter v. Rafferty, 826 F.2d 1299, 1304 (3d Cir. 1987), cert. denied, 484 U.S. 1011 (1988).

On July 9, 1984, a jury convicted Mannello of various crimes stemming from the theft of $4.8 million in food stamp coupons from the U.S. Bank Note Company. On February 21, 1986, he was sentenced to 10 years imprisonment, plus "restitution in the amount of $4.8 million less any amount the government has recovered." App. at 34.

Mannello first contends that no "rational explanation" exists for the disparity between his sentence and that of his co-conspirator, Frank Hutchinson, who received 30 months imprisonment. He suggests that the 90-month disparity occurred because his case went to trial. In the presentence investigation report, the probation office suggested that Mannello ranked slightly below Hutchinson in terms of culpability, but that Mannello had provided the

truck used in the operation and had supervised distribution of the food stamps. Mannello also admittedly perjured himself at trial.

That a defendant, found guilty after trial, receives a harsher sentence than a co-defendant, who pleaded guilty, is insufficient to show that the sentence was vindictive, see, e.g., United States v. Hutchins, 818 F.2d 322, 326-27 (5th Cir. 1987), cert. denied, 484 U.S. 1041 (1988), but the reason for the disparity should be ascertainable from a review of the record. United States v. Capriola, 537 F.2d 319, 320 (9th Cir. 1976) (per curiam). Our first task then is to examine the stated reasons for this disparity.

The magistrate judge determined, and the district court agreed, that

> [t]he record in the case at bar contains ample justification for the differences in the sentences of Mannello and his co-conspirators. Though they were ranked higher than [Mannello] in culpability, [co-defendants] Kakas and Hutchinson cooperated in a significant manner with federal and local authorities. [Mannello], on the other hand, perjured himself at his trial regarding every aspect of his involvement in the crime. A defendant's truthfulness or mendacity while testifying on his own behalf, almost without exception, has been deemed probative of his attitudes toward society and prospects for rehabilitation and hence relevant to sentencing. United States v. Grayson, 438 U.S. 41 (1978). A fact like [Mannello]'s readiness to lie under oath before the judge who will sentence him would seem to be among the more precise and concrete of the available indicia to be considered under our theory of individualized sentencing. Id. at 51. Given the facts contained in the record, as presented to the sentencing judge, [Mannello] is clearly distinguishable from his co-conspirators.

App. at 37-38. We are satisfied that the trial court here has adequately explained the disparity in sentencing.

We next turn to the contention that the order of restitution must be vacated because the government failed to establish loss and the sentencing court failed to determine whether Mannello had the ability to pay. Although the district court considered this argument, we believe it is not subject to collateral review under 28 U.S.C. § 2255. The Supreme Court has held that a section 2255 proceeding may be used only to correct a constitutional error, a jurisdictional error or a fundamental defect resulting in a complete miscarriage of justice. See United States v. Addonzio, 442 U.S. 178, 185 (1979). Because Mannello's argument that the district court failed to follow the statutory provisions governing restitution orders does not rise to the level of a constitutional error or a fundamental defect, we will not consider it here. We have considered all of the appellant's contentions. The judgment of the district court will be affirmed.

TO THE CLERK:

Please file the foregoing opinion.

/signature/
Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:CRIMINAL ACTION
	:No. 84- 00176
v.	:
	:
BRUNO MANNELLO	:

ORDER

AND NOW, this 17th day of April, 1991, it is hereby ordered that:

1. The appended memorandum and order be docketed with the date March 27, 1991.[1]

BY THE COURT

/signature/
J.

ENTERED: APR 18 1991 /stamp/

CLERK OF COURT

1. I signed this order on March 27, 1991, but for reasons I do not know, it was never docketed in the clerk's office. All of the attorneys received a copy of the order from my chambers on March 27, and plaintiff's attorney appealed the order. As a result, if the appended order is not docketed on the date it was signed, there may be confusion with regard to the appeal. This order is intended to avoid that problem.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL NO. 84-00176
	:	
VS.	:	
	:	
BRUNO MANNELLO	:	

MEMORANDUM AND ORDER

DITTER, J. March 27, 1991

This case comes before the court on a motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. §2255. The matter was referred to a magistrate judge who has submitted a report and recommendation. I will adopt the report of the learned magistrate judge, but not his recommendation.

Bruno Mannello was convicted of conspiracy to steal or convert food stamp coupons of the United States in violation of 18 U.S.C. §371, theft of government property in violation of 18 U.S.C. §641, and unauthorized possession and transfer of food stamp coupons in violation of 7 U.S.C. §2024 (b). On February 21, 1986, he was sentenced to ten years imprisonment, to be followed by a five year period of probation. He was also ordered to make restitution in the amount of $4.8 million dollars less any amount of food stamps recovered by the government.

Mannello is presently on parole. He attacks his sentence on two grounds: first, that it was disproportionate to sentences imposed on co-defendants, and second, because there were no explicit findings as to the amount of restitution that would be

required, the defendant's ability to make restitution, and the impact restitution would have upon his dependents.

The magistrate judge adequately deals with the first question, the lack of merit in Mannello's assertion that his sentence was disproportionate to that imposed upon his co-defendants.

In addition, the magistrate judge is correct that there were no explicit findings of fact concerning restitution as required by United States v. Palmer, 760 F.2d 475, 480 (3d Cir. 1985). Because I failed to make the required findings of fact as to restitution, the magistrate judge recommends that the sentence be set aside so that the appropriate findings can be entered of record. I reject this recommendation because to do so at this stage would be a vain act.

As the magistrate judge correctly notes, at the time of the sentencing I had before me information provided by Mannello that his house worth $124,500 but was subject to a first mortgage of $40,000, requiring payments of $671. a month. There was a second mortgage of $20,000 which required payments of $875. a month. He owned a thirty-seven and half percent interest in a restaurant which was valued at $1 million, but subject to a mortgage of $123,000. His two automobiles and furnishings were not of great value. The defendant also claimed he earned between $35,000 and $40,000 gross as the restaurant's manager. He also admitted that he had not filed federal income tax returns for 1980 through 1983. At a later time, he sold his interest in the restaurant and put over $80,000 in a certificate of deposit.[1]

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1. Rule 35 hearing, March 14, 1988, N.T. p. 20.

I also knew that at least $2,678,500 worth of food stamps, stored at defendant's restaurant, had been distributed between December, 1983 and April, 1984. The defendant received various sums for stamps: on one occasion $625; on another $1000,; and $20,000 more in random installments.

None of these facts were disputed by the defendant. In fact, he had furnished most of them himself.

At the time sentence was imposed, 18 U.S.C. §3580 governed the procedure for issuing orders of restitution. It required the court to consider the amount of loss suffered by a victim, the financial resources of the defendant, the financial needs of his dependents, and other appropriate factors. Section 3580(d) provided that the burden of demonstrating financial needs of the defendant's dependents should be upon the established that the face value of the food stamps stolen was $4.8 million. Stamps worth approximately 2.6 million were recovered through the cooperation of one of Mannello's co-defendants, and additional recoveries or redemptions amounted to about $309,000. Therefore, at the time of the sentencing approximately $1.9 million remained unaccounted for. My sentence required the defendant to make restitution in the amount of $4.8 million, less any amount the government had recovered. It was my hope at the time that the government would recover additional sums and that the amount of restitution would be reduced accordingly. Obviously, I could not state with any precision just how much restitution should be paid, nor could I state what the defendant's ability to make restitution would be.

The passage of time has dimmed the possibility that any significant blocks of

unused food stamps will be found. The burden on the government to establish what amount it lost through the redemption of the stolen food stamps would be monumental. There would be no point in making the government try to do so, nor would there be any point in my making findings of fact concerning the ability of the defendant to make restitution or the effect of a restitution order upon his dependents. More than five years has passed since the order of restitution was imposed upon the defendant. He has served his time in prison and is now on parole. During this time he has not paid any significant restitution at all -- in fact, a little more than $1,000. There is no danger that he will pay too much restitution. There is no danger that restitution that might have better gone to his dependents will go to the government. Supplementing his failure to make restitution was his failure to support his dependents, as shown by evidence during his Rule 35 hearing three years ago. At that time I was shown a copy of a letter from Mrs. Mannello's attorney who pointed out that neither Mrs. Mannello nor her children were receiving support from the defendant, that the history of the marriage was one of financial disaster for Mrs. Mannello, and that her support came from her parents, the defendant's parents, and welfare. Of course, he now may be doing more to support his family, or he may be doing less. I do not know. It is certain, however, that the discharge of his support obligation will not have been influenced by the sentence I imposed upon him and will not be improved by my resentencing him. To hold a hearing, make findings, and resentence Mannello at this juncture would be a complete waste of time. This does not mean, of course, that I would not entertain a motion to reduce the amount of restitution to a sum that takes into account the value of food stamps that have been recovered.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL NO. 84-00176
	:	
vs.	:	
	:	
BRUNO MANNELLO		

ORDER

AND NOW, this 27th day of March, 1991, the recommendation of the learned magistrate judge dated the 16th day of July, 1990, is hereby rejected and the motion of the defendant pursuant to 28 U.S.C. §2255 to vacate, set aside, or correct the sentence imposed on February 21, 1986, is hereby refused.

BY THE COURT:

/signature/
J.